

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
LINDSAY OLIVE GROWERS)
For Review of Cleanup and Abatement)
Order No. 92-708 of the California)
Regional Water Quality Control Board,)
Central Valley Region. Our File)
No. A-823.)
_____)

ORDER NO. WQ 93-17

BY THE BOARD:

Lindsay Olive Growers seeks review of Cleanup and Abatement Order No. 92-708 (Order or CAO) issued by the Executive Officer of the California Regional Water Quality Control Board, Central Valley Region (Regional Water Board). The Order requires the City of Lindsay and the Petitioner to clean up and abate the effects of the discharge of wastewater to olive brine disposal ponds operated on behalf of Petitioner by the City. Petitioner has requested that it be removed from the CAO or that the CAO be rescinded. Petitioner argues that it was improperly named as a party to the Order and that the process by which the Order was issued violated legal requirements.

For the reasons hereafter stated, we find no defects with the Order or the process by which the Order was issued. We therefore affirm the Cleanup and Abatement Order issued by the Regional Water Board.

I. BACKGROUND

The City of Lindsay is in central Tulare County, about 15 miles east of Tulare, and about 15 miles southeast of Visalia. Petitioner's olive processing plant has been in the City since 1916. During operations, olive processing wastewater was generated which contained high amounts of dissolved solids.

Wastewater from the plant is classified as "designated waste" in accordance with Title 23, Cal. Code of Regs. Section 2510 et seq. (Chapter 15). Designated waste is defined as "non-hazardous waste which consists of or contains pollutants which, under ambient environmental conditions at the waste management unit, could be released at concentrations in excess of applicable water quality objectives, or which could cause degradation of waters of the State". 23 Cal. Code of Regs. § 2522(a)(1). Wastewater sampling indicates that electrical conductivity (EC) has ranged from 1,020 to 61,000 $\mu\text{mhos/cm}$ and chloride concentration has ranged from 80 milligrams per liter (mg/l) to 20,700 mg/l. "Typical" EC of the wastewater has been above 4,000 $\mu\text{mhos/cm}$ and chloride has been above 1,000 mg/l. Background EC in the ground water is approximately 1,000 $\mu\text{mhos/cm}$, and chloride concentration is approximately 70 mg/l. The recommended drinking water standard for EC is 900 $\mu\text{mhos/cm}$ and for chloride is 250 mg/l, and the maximum allowable drinking water standard for EC is 1600 $\mu\text{mhos/cm}$ and chloride concentration is 500 mg/l. 22 Cal. Code of Regs. § 64473.

Beginning in 1916, wastewater from Petitioner's plant has been discharged to the City sewer. That wastewater was in

turn discharged from the Lindsay Sewage Treatment Plant to unlined ponds and fields. In 1962, the Department of Water Resources (DWR) determined that due to its salinity, the wastewater discharged by the Lindsay sewage treatment plant was unsatisfactory for most crops. DWR determined that approximately half the flow and most of the salt load to the City's sewage system was contributed by the Petitioner's plant. It also determined that ground water had been degraded by saline wastewater migration from the plant.

As a result of the DWR study, the Regional Water Board imposed waste discharge requirements (WDRs) on the City (Resolution No. 63-183) for the sewage effluent, which still contained the olive brine wastewater component. The WDRs set effluent limits for TDS, chloride, and sodium ratio. In order to comply with the WDRs, the City constructed four new ponds with compacted soil for the brine discharge. Wastewater from Petitioner was discharged to the sewer during low flow periods (i.e., early morning), and when it reached the sewage treatment plant, it was diverted to the brine ponds. The discharge was diverted to the new ponds when the EC exceeded a certain level. During higher flow hours, domestic wastewater was discharged to unlined ponds and fields as it was before construction of the brine ponds.

The plan was ineffective at preventing saline wastewater from being discharged with the domestic wastewater. In 1966, a series of inspections by DWR found chloride

concentrations in the domestic wastewater ponds as high as 3,300 mg/l, well in excess of the 450 mg/l effluent limit for chloride. As a result, the Regional Water Board adopted Cease and Desist Order (C&D) No. 67-84 on the City.

In response to the C&D, the City built the present ponds exclusively to handle the brine wastewater from Petitioner's processing plant. The ponds were built between 1967 and 1974, and were lined with a single 10 mil PVC liner. At least one of the ponds (Pond F) was built by Petitioner at its own expense. In 1969, the City completed a dedicated outfall line from Petitioner's processing plant to the new ponds. One of the ponds (Pond D) was reconstructed in 1985 with a 30 mil "hypalon" liner.

The ponds and outfall were financed by local bonds, and state and federal loans and grants. The City in turn assessed Petitioner for repayment of the local bonds and the state loans. As a result of this work, the Regional Water Board rescinded the C&D in 1971 (Order No. 71-331).

In the early and mid 1980s, DWR determined that the disposal of Petitioner's brine wastewater at this site was continuing to impair ground water quality. Monitoring wells at the site exhibited salinities well in excess of background and drinking water standards. Ground water EC was measured as high as 14,000 μ mhos/cm and chloride concentration was measured as high as 5,705 mg/l. Numerous domestic and agricultural wells in

the vicinity were polluted, with chloride concentrations as high as 5,686 mg/l and EC as high as 14,900 μ mhos/cm. Ground water is the only drinking water source in the area. Odors had also become a perennial problem. Numerous complaints regarding odors generated by the ponds have been received each year from 1981 to 1992. The ground water pollution and odors were violations of the City's WDRs, which prohibited the creation of pollution or nuisance conditions.

In 1984, the State Water Resources Control Board (State Water Board) revised Chapter 15 (then called "subchapter 15") standards for waste discharges to land. 23 Cal. Code of Regs. § 2510, et seq. The single-lined brine disposal ponds did not meet the minimum construction standards contained in Chapter 15 for containing designated waste (Class II surface impoundments). Therefore, in 1987, the Regional Water Board adopted WDRs (Order No. 87-054) requiring the City to close or retrofit the ponds in accordance with Chapter 15.

In 1991 the Regional Water Board determined that the City had not complied with the 1987 WDRs. The Board adopted C&D Order No. 91-151 requiring the City to cease generation of nuisance odors, close or retrofit the brine ponds in accordance with Chapter 15, develop a corrective action program for ground water remediation, and evaluate alternatives for a water supply to affected private well owners. The C&D remains in effect.

In 1992, the Executive Officer issued CAO No. 92-708 to the City and to the Petitioner. The Cleanup and Abatement Order required both parties to cease generation of nuisance odors,

close or retrofit the ponds in accordance with Chapter 15, develop a corrective action program for ground water remediation, and provide an alternative water supply to affected private well owners. It is this latest order which is the subject of this review.

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner contends that it is not a responsible party for contamination from the City of Lindsay's ponds because it discharges lawfully to a permitted municipal system. Such discharges, it argues, are exempted from regulation under the Water Code.*

Finding: The California Water Code does not insulate Petitioner from responsibility for the discharges to the City's sewage system. There is no express exemption, and the terms of Water Code Section 13304 are broad enough to include responsibility on behalf of Petitioner.

Water Code Section 13304 authorizes the Regional Water Board to issue a CAO to any person who "discharges waste...in violation of any waste discharge requirements" or any person who "causes or permits...any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance."

* All contentions not discussed in this order are denied for failure to raise substantial issues appropriate for review. Title 23, California Code of Regulations, Section 2052(a)(1). People v. Barry (1987) 194 Cal.App.3d 158, 139 Cal.Rptr. 349.

Petitioner argues that no WDRs were issued naming Petitioner, therefore it was never in violation of WDRs. That contention is true, but not relevant. Petitioner further argues that it never "caused or permitted" pollution of ground water at the Facility. Petitioner contends the City owned and operated the Facility, and Petitioner had no control over its operation, therefore Petitioner cannot be held liable for problems at the Facility. With this contention, under the facts of this case, we disagree.

Petitioner argues that once it disposed of the waste in the City's sewer system, it "had no control over the treatment and handling of the waste." Petition at 8. The facts in the record belie this contention. The relationship between Petitioner and the City has been such that in effect Petitioner shared control of the operation of the Facility. According to the 1968 contract between the City and Petitioner, the "size, dimension, design, and capacity of the industrial waste line" had to be mutually agreed upon by the City and Petitioner (then Consolidated Olive Growers). The Facilities described by the agreement were for the exclusive use of Petitioner, although the agreement allowed other users. Generally, all direct costs were to be paid by users of the system, i.e., Petitioner. Petitioner had to approve any additional industrial users of the system and the user fee charged those users. The maximum term of the bonds to be issued by the City to finance the ponds and the waste line was set at 25 years, and "[a]ny shorter term [was] at the sole

discretion of" Petitioner. Petitioner was the sole user of a system that includes 190 acres of ponds and a dedicated outfall line between the plant and the ponds. All costs for the system, including construction, operation, and maintenance expenses and repayment of construction bonds have been borne by Petitioner until it ceased operations in September 1992. Petitioner in fact built one of the ponds (Pond F) at its own expense. Petitioner controlled operation of the facility, repaying the debt incurred by the City on its behalf, exercising prior approval over design, terms of the debt, and connection of additional users. The pollution has been caused by the high chloride concentration and EC from Petitioner's wastewater.

In short, the record demonstrates that: the Facility was constructed for the sole purpose of receiving Petitioner's wastewater; the Facility was financed by the City on behalf of Petitioner; all construction and operating expenses have been paid by Petitioner until it ceased operations; and the ground water pollution is due to waste from Petitioner. Based on such facts, it was appropriate to include Petitioner within the broad coverage of Water Code Section 13304.

Petitioner also contends that its discharge to a community sewer system is insulated from liability under the Water Code and the Federal Clean Water Act. A discharger of wastewater to a community sewer system is not required to file a report of waste discharge with the Regional Water Board. Water Code § 13260(a)(1). However, the fact that Petitioner does not

have to file a report of waste discharge does not insulate Petitioner from being subject to other sections of the Water Code.

The Federal Clean Water Act does not apply in this case because no NPDES permit or other action under federal law is at issue in this case.

Petitioner was properly named as a party to the CAO for cleaning up and abating the effects of the discharge to the ponds because it had caused or permitted wastewater with high chloride concentrations and EC to be discharged or deposited in unlined and inadequately lined ponds, where it was discharged into the ground waters of the State and created a condition of pollution and nuisance.

2. Contention: Petitioner argues that it cannot be responsible for cleanup and abatement of the ponds, because Water Code Section 13304(f) states that cleanup and abatement orders cannot impose any new liability for acts occurring before January 1, 1981.

Finding: This contention is incorrect for two reasons. First, the record clearly reflects that new contamination and nuisance conditions have occurred since 1981. In addition, discharges which caused nuisance conditions prior to 1981 did not comply with the existing law at that time.

The ponds were constructed in 1969, and contamination was documented before 1981. Petitioner argues that the Facility was in compliance until 1985 when Chapter 15 was adopted, and

that any pollution reaching ground water at the site is most likely due to waste deposited prior to 1981. Petitioner contends that since actions under Section 13304 do not impose any new liability for acts occurring before January 1, 1981 if the acts were not in violation of laws and regulations at the time they occurred, a CAO cannot be applied to Petitioner in this case.

The record does not support Petitioner's contention that all pollution of ground water has resulted from waste discharged prior to 1981. Much of the ground water pollution at the Facility is due to leakage of brine waste from the ponds after 1981 (and 1985). Many of the ponds have contained wastewater continuously since 1981. Ground water quality in a monitoring well adjacent to these ponds (MW-20) has continued to decline since the well was installed, while ground water quality in a well adjacent to ponds dry since 1985 (MW-06) has improved. This evidence indicates that the ponds are still leaking and polluting ground water. In addition, the ponds have created nuisance odor conditions every year since 1981.

Second, though Water Code Section 13304(f) limits strict liability for acts before January 1, 1981, it does not limit liability for acts that were in violation of existing laws or regulations at that time. The leakage and pollution which resulted from Petitioner's discharge before 1981 was a violation of the law in existence at the time. Since 1872, California law has prohibited the creation of a public nuisance. In 1925, water pollution was held by the courts to be a public nuisance. And

since 1949, California law has expressly prohibited any discharge of waste in a manner which results in pollution, contamination, or nuisance. Additionally, the Porter-Cologne Water Quality Act of 1969 defined nuisance and authorized Regional Water Boards to order cleanup. The definition included anything that: (1) is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property; (2) affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal; and (3) occurs during or as a result of the treatment of wastes.

It is clear from the facts that the Petitioner wastewater disposal meets the definition of a nuisance under the 1969 law: Petitioner's wastewater was piped to the brine ponds; the wastewater was "treated" by aeration and evaporation; the "treated" wastewater polluted the ground water, producing high chloride concentrations and EC and creating odors which were offensive to the senses; and domestic and agricultural wells in the community were adversely impacted.

Evidence in the record indicates that the ponds were leaking and polluting ground water before, during, and after 1981. Odors from the facility have created documented nuisance conditions every year since 1981. Nuisance conditions, leakage, and pollution which occurred before 1981 was a violation of statutes in existence at the time, and was actionable under law

at the time. Thus, Petitioner's contention that Water Code Section 13304(f) insulates it from responsibility is without merit.

3. Contention: Petitioner argues that it cannot be named as a responsible party in the CAO because the Tulare County Superior Court has already ruled on the question of Petitioner's liability.

Finding: The Superior Court's ruling is not dispositive here, because (1) the court case did not involve the Regional or State Water Board as a party, and (2) the burden of proof in the private litigation is different from the showing that the Regional Water Board needs to include a party in a CAO. In private litigation initiated by landowners with polluted wells, the Superior Court held that the City, not the petitioner, was responsible for the pollution. Petitioner seeks to assert the legal doctrine of res judicata against the Regional Water Board. That doctrine allows a ruling in one case to be used in a different case either against the same parties or against different parties under very limited circumstances. The fact that the Board was not a party to the earlier litigation, and the different burdens of proof involved preclude the use of the doctrine in this case. That ruling is binding only on the parties involved, and does not preclude the Regional Water Board from proceeding with the cleanup and abatement order against Petitioner.

4. Contention: Petitioner contends that the CAO was improperly issued by the Regional Water Board staff--not the Executive Officer--an action which is an impermissible delegation of authority.

Finding: The CAO was properly issued by the Executive Officer of the Regional Water Board. This contention is really two separate arguments. First, petitioner claims that the signature on the CAO was not the Executive Officer's but was instead signed by the Principal Engineer for the Fresno office. Petitioner was correct in asserting that the Principal Engineer cannot issue a CAO, but that did not happen here. The CAO was signed by the Principal Engineer on behalf of the Executive Officer. It was the Executive Officer's signature line, and the order went out under the Executive Officer's name. The Principal Engineer is authorized to sign documents in the Executive Officer's absence. There is nothing improper in this case.

Petitioner also argues that the CAO was, in effect, an amendment of the cease and desist order that had been issued against the City, and as such, could be issued only after a hearing by the Regional Water Board. Thus, Petitioner contends that no staff, not even the Executive Officer, could issue the Order.

Cleanup and Abatement Order No. 92-708 did not modify either the C&D or the WDRs regulating the facility, and did not affect either of their requirements or applicability. The Order was a CAO issued pursuant to Water Code Section 13304. All

actions required by the CAO are designed to clean up or abate the effects of the discharge of wastewater from Petitioner's plant, and fall within the authority of a CAO as established by statute. The Water Code allows delegation of the issuance of a CAO to the Executive Officer. The Regional Water Board has in fact delegated duties and powers to the Executive Officer, which include issuance of a CAO, in Resolution No. 70-118. In the absence of the Executive Officer, the Assistant Executive Officer, or in his/her absence, the Principal Engineer may sign for the Executive Officer. The Principal Engineer of the Fresno office signed the CAO upon authorization of the Executive Officer.

Finally, it must be noted that the Regional Water Board held a hearing on October 23, 1992 to consider amendments of the time schedules contained in the CAO. At the close of the hearing, the Regional Water Board noted to maintain the timetable, thus ratifying it.

5. Contention: Petitioner claims that the lack of a hearing before issuance of the CAO violated its constitutional right to due process.

Finding: There is no constitutional defect either with the CAO process or with the process afforded to Petitioner. Petitioner argues that the issuance of the CAO was an action that required a public hearing, under the California and U.S. Constitutions. However, no hearing was held, and there was no provision for an automatic hearing to review the administrative

action. Therefore, Petitioner argues that its due process rights were violated.

Following issuance of the CAO, Petitioner requested a hearing before the Regional Water Board to reconsider the dates and time schedules in the CAO. Board staff responded by scheduling a hearing at the next regular Board meeting (October 23, 1992). This hearing was held as mentioned above. Petitioner did not attend. Additionally, Water Code Section 13320 provides that any party may petition the State Water Board for review of a Regional Water Board action or failure to act. Petitioner has exercised this option, and is receiving its second opportunity for review. There is no constitutional violation here.

6. Contention: Petitioner contends that the CAO was issued in violation of California Environmental Quality Act (CEQA).

Finding: The CAO cites 14 Cal. Code of Regs. Section 15321(a) to reference the categorical exemption from compliance with CEQA. Petitioner suggests two other exemptions that might also apply: 14 Cal. Code of Regs. Sections 15307 and 15308. Petitioner then argues why these sections would not be appropriate. These sections may or may not have applied in this case; however, the Regional Water Board relied on the cited section.

Petitioner argues that in any case an exemption only applies when "it can be seen with certainty that there is no

possibility that the activity in question may have a significant effect on the environment." Petitioner argues that the CAO may have significant impacts on the environment (e.g., through closure of the ponds), and therefore the exemptions should not have applied.

The issuance of an enforcement order is categorically exempt from CEQA in accordance with 14 Cal. Code of Regs. Section 15321 and Public Resources Code Sections 21083 and 21087. While some of the alternatives which petitioner may choose to comply with the CAO may have "a significant effect on the environment," these alternatives are by no means the only ones available to the petitioner. Independent CEQA review will occur at the time that Petitioner chooses a remedy and seeks the appropriate permits and approvals. If the chosen alternatives will indeed have a significant adverse affect on the environment, then a categorical exemption would be inappropriate. At this time, however, the Regional Water Board is simply instructing Petitioner to clean up and abate the effects of the discharge, without specifying manner of compliance. At this stage it is unlikely that cleanup and abatement itself will have an adverse impact on the environment. The Regional Water Board action was properly exempt from CEQA according to Section 15321(a).

7. Contention: Petitioner was not named in Cease and Desist Order 91-151 issued in 1991, nor in any of the prior orders issued by the Regional Water Board governing discharges to the Lindsay Ponds and, thus, is not responsible for any

violations of any conditions in such orders or for failure to act thereon.

Finding: Cease and Desist Order No. 91-151 was issued in accordance with Water Code Section 13301 against the City for failure to comply with WDRs Order No. 87-054. A C&D can only be issued for violations of WDRs. Since Petitioner was not issued WDRs, it was not subsequently named on the C&D.

Petitioner is correct in its assertion that it is not responsible for violations of the C&D Order No. 91-151 or the WDRs on which the C&D was based. However, the Board's issuance of a C&D against the City for pollution from the brine ponds does not preclude the Board from issuing a CAO to Petitioner if the criteria established in Water Code Section 13304 are met. The findings in CAO No. 92-708 meet the criteria of Water Code Section 13304.

The CAO does not hold Petitioner liable for violations of WDRs. Instead, Petitioner is named as a party to the CAO because it caused or permitted...olive brine waste to be discharged into waters of the State and created conditions of pollution and nuisance. As discussed above, Petitioner's plant

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was the sole source of all wastes discharged to the ponds, and the pollution at the Facility is due the Petitioner wastewater.

IV. ORDER

IT IS HEREBY ORDERED that the Cleanup and Abatement Order is affirmed.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on November 18, 1993.

AYE: John Caffrey
Mary Jane Forster
John W. Brown

NO: None

ABSENT: Marc Del Piero
James M. Stubchaer

ABSTAIN: None


Maureen Marche
Administrative Assistant to the
Board